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No. 90-904

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

The Miami Herald Publishing Company, et al.,

Petitioners,

v.

Florida Department of Revenue, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

# BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Petitioners offer two Questions Presented which are as follows:

I. Does Florida's application of its sales and use tax to magazines but not to newspapers violate the First Amendment?

II. Assuming arguendo that Florida's application of its sales and use tax to magazines but not to newspapers violates the First Amendment, does the First Amendment require that the Florida sales and use tax as applied to magazines be invalidated?

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## OPINION BELOW

Respondent, the Florida Department of Revenue (Department) accepts Petitioners', The Miami Herald Publishing Company, The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company and Citrus Publishing Company's (Newspaper Publishers'), statement.

## JURISDICTION

Respondent accepts Petitioners' statement.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioners' statement, except that Respondent asserts that the following statutory provision is not involved in this case.

Section 212.06(9), Florida Statutes, provides:

> The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

The Florida Supreme Court specifically declined to determine any matter regarding an exemption for religious publications.[1]

Furthermore, Section 212.05(1)(i), Florida Statutes, is set out verbatim by Petitioners. However, Respondent asserts that the case also involves section 212.05(1)(a)1.a., Florida Statutes, which provides:

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[1] Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304, 1305 n. 2 (Fla. 1990) (The opinion below is reprinted in Petitioners' appendix (App. A-1 - A-14) and the passage here relied upon can be found at App. A-2 - A-3); See also Petition for Writ of Certiorari (Petition), 5 n. 3.

> (1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
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> (a) 1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.[2]

Finally, Respondent asserts that this case involves sections 212.21(2), (3), Florida Statutes,[3] which sections state:

> **212.21 Declaration of legislative intent.-**
>
> (2) It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied

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[2] 565 So.2d at 1310 n.8, App. A-13 n. 8.

[3] 565 So.2d at 1310, App. A-13 - A-14.

and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission, use, storage, consumption, or rental, or any of them exempted or attempted to be exempted from the tax or taxes or the operation or the imposition of the tax or taxes, shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption had never been included herein.

(3) It is further declared to be the specific legislative intent to exempt from the tax or taxes or from the operation or the imposition thereof only such sales, admissions, uses,

> storages, consumption, or rentals in relation to or in respect of the things set forth by this chapter as exempted from the tax to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States. It is further declared to be the specific legislative intent to tax each and every taxable privilege made subject to the tax or taxes, except such sales, admissions, uses, storages, consumptions, or rentals as are specifically exempted therefrom by this chapter to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States. (e.s.)

## STATEMENT OF THE CASE

Respondent accepts Petitioners' Statement of the Case with the following exceptions and additions.

Prior to 1987, over-the-counter sales of magazines were taxed while subscription sales were exempt from

Florida tax. Chapter 57-821, section 1, Laws of Florida (1957).

**REASONS FOR DENYING THE WRIT**

In order to warrant a writ, there must be a "real or intolerable" conflict on the same matter of law or fact, and [not] merely an inconsistency in dicta. . . ." R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice, Section 4.3 (6th Ed. 1986). Respondent submits that the Petitioners do not present a substantial federal question, decided adversely to them by the Supreme Court of Florida below, which is in conflict with any other decision of a state court of last resort.

The Petitioners, consisting of a group of newspaper publishers, come before this Court in an unusual posture. The underlying basis of Petitioners'

argument is that the decision of the Supreme Court of Florida conflicts, pursuant to Rule 10.1(b), with the decision of another state court of last resort on the same federal question.[4]

The instant suit was brought by the Magazine Publishers of America, Inc., The Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc., and Meredith Corporation (collectively the "Magazine Publishers"). The Magazine Publishers argued that the differential taxation of magazines violates the federal and Florida constitutions. 565 So.2d at 1305, App. A-2. The Petitioners were intervenors below. Id. at 1304, n. 1, App. A-1.

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[4] The only arguably conflicting decision cited by Petitioners is Hearst Corp. v. Iowa Department of Revenue and Finance, 461 N.W. 2d 295 (Iowa 1990).

Petitioners' Statement of the Case argues that publishers of magazines brought suit "in the wake of recent decisions of this Court." Petition, 4. Respondent asserts that the Magazine Publishers were, as likely as not, reacting to the reinstatement of an exemption for newspapers by Chapter 87-548, section 26, Laws of Florida (1987), while magazine sales remained taxable.

With regard to the newspaper exemption, the trial court found it advanced no compelling state interest. App. A-18 - A-19. The Florida Supreme Court went so far as to state that it is "questionable" whether the interest which the Department did assert - promoting immediate dissemination of news - would survive even a rational relation analysis. 565 So.2d at 1308, App. A-9 - A-10.

Turning to the Department's contention below that the proper remedy to a finding of unconstitutional differential treatment was severance of the statute's newspaper exemption, the Florida Supreme Court built its decision on the proposition the First Amendment does not prohibit a tax on the press. 565 So.2d at 1305-1306, App. A-3.

The Florida Supreme Court concluded that the correct response in the case at bar under Florida law was elimination of the exemption.[5] In determining that resort to Florida law was appropriate, the Florida Supreme Court relied on this Court's opinion in the case of Texas Monthly, Inc. v.

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[5] Id. at 1309-1310, App. A-10 - A-12.

Bullock, 489 U.S. 1 (1989).[6]

The Florida Supreme Court found that Section 212.21, Florida Statutes, made its choice of remedy "unmistakably clear." 565 So.2d at 1310, App. A-14.

The Florida Supreme Court found that Florida's sales tax scheme unconstitutionally burdened First Amendment interests due to the differential treatment of magazines and newspapers. 565 So.2d at 1309, A-10 - A-11. The Florida Supreme Court ended the differential treatment complained of by the Magazine Publishers by severing

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[6] This Court stated:

"[i]t is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether." Id. at 8.

the exemption granted newspapers. 565 So.2d at 1310-1311, A-14.

Neither the Department nor the Magazine Publishers have petitioned this Court for relief. The Department notes that the Florida Supreme Court opined that, given the asserted state interest, "[i]t is questionable whether this asserted interest would survive even a rational relation analysis." 565 So.2d at 1308, App. A-9 - A-10. The Department also relied below on the earlier case of Gasson v. Gay, 49 So.2d 525 (Fla. 1950). However, in the decision below, the Florida Supreme Court receded from its earlier decision in Gasson. 565 So.2d at 1309 n. 7, App. A-10 n. 7.

With regard to Petitioners' first question presented, the interest of the Newspaper Publishers is not that of one

denied a federal right. Enforcement of the judgment will not deprive the Newspaper Publishers of a right arising under the Constitution personal to themselves. They do not assert otherwise. Nor do the Newspaper Publishers have a duty to enforce state statutes giving rise to a personal interest in the litigation, thus creating a case or controversy. See Diamond v. Charles, 476 U.S. 54, 63-65 (1986).[7]

Moreover, an intervenor whose only interest is in the effect of the

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[7] Contrast, Newsweek, Inc. v. Celauro, 789 S.W. 2d 247 (Tenn. 1990), petition for cert. filed, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90-273), and Southern Living, Inc. v. Celauro, 789 S.W. 2d 251 (Tenn. 1990), petition for cert. filed, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90-273). Unlike the State of Tennessee, the Department has determined not to petition this Court for relief based upon the facts, circumstances and record of this case.

decision as a precedent may not seek certiorari as having an independent right which has been violated. Cf. Boston Tow Boat Company v. United States, 321 U.S. 632 (1944) (An intervenor without other interest than a desire to prevent a decision that might adversely affect its position in other litigation had no independent right violated by the decision adverse to another.) The Department asserts that precedential value forms the singular basis for the Newspaper Publishers' argument that this Court should grant its writ. Petition, 8-10.

The second question presented merely argues that the Newspaper Publishers are dissatisfied with the remedy provided to the Magazine Publishers pursuant to state law. However, the judgment of the Florida

Supreme Court on this point also does not collide with or deny any federal constitutional right held personally by the Newspaper Publishers.

The Florida Supreme Court determined, as a matter of Florida law, that severance of the exemption was, unmistakably, the clear choice. 565 So.2d at 1310, App. A-14. Assuming, for purposes of argument that the First Amendment mandates that the Magazine Publishers are entitled, as a matter of federal law, to elimination of the tax, it does not follow that the Newspaper Publishers are entitled to argue for the exclusivity of that remedy here. Only the Magazine Publishers might have petitioned this Court for review and thereafter claimed that the decision below did not afford them an appropriate and complete remedy to their challenge.

Thus, Petitioners' second question does not derive from a denial of the Newspaper Publishers' federal rights. Therefore, the Department respectfully suggests that this Court decline review. See Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 97 (1909); Diamond, supra.

Moreover, Respondent asserts that the second question presented is plainly unsubstantial. The remedy to the Magazine Publishers' challenge was appropriately determined as a matter of state law in light of the clear precedent of this Court. The unsoundness of Petitioners' second question presented results from the previous decision of this Court in Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989).

Why then do Petitioners seek review? The unadorned effect of the

judgment upon the Newspaper Publishers lies in the invalidation of an exemption for newspapers granted by state law rather than its expansion to include magazines. Therefore, Petitioners - as newspaper publishers - might have asserted as injury the deprivation of some constitutional entitlement to a newspaper exemption. Clearly, however, the Newspaper Publishers do not even mention this, their only arguable injury.

It is submitted that Petitioners understand that in order to merit review they must raise a substantial federal question. See California Water Service Company v. City of Redding, 304 U.S. 252 (1938). The federal question which the Department would ascribe to the Petitioners' "injury" - whether newspapers are entitled as a matter of

federal law to a sales tax exemption - is plainly unsubstantial. Its unsoundness results from previous decisions of this Court.[8] Thus, the Newspaper Publishers' attempt to redraw the issues.

The case below did involve a challenge to a Florida statutory scheme that granted a sales and use tax exemption to newspapers similar to that granted in other states. The Florida Supreme Court affirmed the state trial court decision finding the differential treatment of newspapers and magazines unconstitutional just as most other state courts have done. However,

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[8] See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (dicta); Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) (dicta); Branzburg v. Hayes, 408 U.S. 665 (1972) (dicta); Grosjean v. American Press, 297 U.S. 233 (1936) (dicta).

Florida declined to extend its newspaper exemption to magazines. It did not find that the tax on magazines was unconstitutional. Rather, it concluded that the correct response under Florida law was elimination of the exemption. It is that remedy to which the Newspaper Publishers now object.

Thus, the questions presented by Petitioners are not quite what they seem. The Florida courts, while determining to end differential treatment, choose to end the matter by striking an exemption. This solution was compelled by the overall purpose of the revenue measure and the stated intention of the Florida Legislature, which granted the exemption in the first instance.

What the Newspaper Publishers want, instead, is for this Court to

mandate that the Magazine Publishers receive no relief, or a different relief that protects the exempt status of newspapers. This demand suffers from serious shortcomings, among which is that the Newspaper Publishers have no federal right to a state sales tax exemption. Florida courts have decided to remedy the flaw and have acted well within the bounds of their authority in concluding that severance of the exemption was a sufficient remedy. Accordingly, the Department would respectfully request that the petition for writ of certiorari be denied.

## CONCLUSION

The Petitioners do not present grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Therefore, Respondent

respectfully requests that the Petition be denied.

Respectively submitted,

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